

No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Cross-Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine,

Cross-Appellee.

BRIEF FOR CROSS-APPELLEE.

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BRIEF FOR CROSS-APPELLEE.

Jurisdiction of the District Court.

This is a Cross-appeal from a Summary Judgment of the District Court of the United States, for the Southern District of California, Central Division, entered April 29, 1953, and involves an interpretation of the Copyright Laws of the United States, particularly Section 24 of Title 17 of the United States Code. The action was brought under the Federal Declaratory Judgment Act, Section

2201 of Title 28, U. S. C., by Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, a minor, seeking a declaration of the respective rights of said minor and defendant (cross-appellant) with respect to the renewal rights of certain musical copyrights owned, during his lifetime, by George G. DeSylva, deceased [R. 1-7]. Cross-appellant is the widow of said decedent, and cross-appellee is his son. In the Trial Court each party made a motion for summary judgment based upon certain undisputed facts, and the Court made findings of fact based upon these undisputed facts and rendered judgment. Jurisdiction was conferred on the District Court by Title 28, U. S. C., Section 1338(a), providing for original jurisdiction in the United States District Court of any civil action arising under any act of Congress relating to copyrights.

Jurisdiction of the United States Court of Appeal.

This Honorable Court has jurisdiction to review the judgment rendered by the District Court under the provisions of Title 28, U. S. C., Sections 1291 and 1294.

Statement of the Case.

We are here concerned only with matters relating to the Cross-appeal. The facts are substantially set forth in Appellant's Opening Brief, and Cross-appellant's Opening Brief.

The Trial Court made findings of fact based upon the undisputed facts. The Trial Court did not (and under the circumstances and law relating to summary judgment, could not) attempt to determine any disputed fact; and the Trial Court in effect held that the undisputed facts were

sufficient upon which to predicate judgment. Cross-appellant does not take issue with any of the findings of fact made by the Trial Court.

The particular undisputed facts relating to the problem in this Cross-appeal are as follows:

1. That cross-appellee is the son of George G. DeSylva, deceased, who is survived by the said son (his only child) and by his widow, the cross-appellant herein.

2. That one Marie Ballentine is the mother of cross-appellee. That said Marie Ballentine and said decedent were never married.

3. That cross-appellee was treated in all respects as a child of decedent, taken into decedent's home, and decedent at all times maintained a father and son relationship with cross-appellee.

4. That decedent, by his sworn statements, affidavits, and in his will and codicils thereto, and in other respects, publicly and in the presence of witnesses and in writing acknowledged and reiterated that cross-appellee was his child.

The Trial Court found and determined that decedent during his lifetime acknowledged in writing that cross-appellee was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California [Findings of Fact IV, Tr. 30].

5. The additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California, being in dispute, were not

determined by the Trial Court, the said Court holding in effect that such determination was not necessary in view of the Court's decision that the undisputed facts were sufficient to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyrights.

Question Presented.

IS CROSS-APPELLEE THE "CHILD" OF THE ORIGINAL COPYRIGHT HOLDER WITHIN THE MEANING OF THE COPYRIGHT LAWS PERTAINING TO THE RENEWAL OF COPYRIGHTS?

Summary of Argument.

It is cross-appellee's position herein that (1) an acknowledged illegitimate child is a child within the meaning of the statutes of the United States relating to copyrights, and that the acknowledgment of an illegitimate child within the meaning of Section 255 of the Probate Code of the State of California clearly brings said child within the meaning of "child" as used in statutes of the United States relating to copyrights, and particularly Section 24, Title 17, U. S. C., which confers in the alternative upon certain designated classes of persons, the right to renewals and extensions of copyrights; and (2) it is further contended by cross-appellee that said Section 24, Title 17, U. S. C., gives certain renewal and extension rights to the *children of the author* without distinction between legitimate or illegitimate children; that cross-appellant has admitted that said minor, Stephen William Ballentine, is the son of George D. DeSylva, deceased, and that *said admission alone* is sufficient to constitute said minor a child of said deceased within the

meaning of the statutes of the United States relating to copyrights; and (3) that the undisputed facts were sufficient upon which to predicate the determination that said minor is a child of the deceased within the meaning of the statutes of the United States relating to copyrights; and (4) that in the event this Honorable Court finds that a determination of the additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California, was and is necessary to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyright, then the cross-appellee is entitled to a trial on said additional facts and the case should be sent back to the Trial Court for said purpose.

Preliminary Statement.

When this case was submitted to the District Court for decision, the Court had before it a stipulation of the parties that Stephen William Ballentine is the son of George G. DeSylva and of Marie Ballentine [Tr. p. 20].

It is respectfully submitted that Section 24, Title 17, U. S. C., is not a statute of inheritance, but creates a new right; that the right to the renewal of copyrights does not grow legally out of the original copyrights, but is a new creation for the benefit (if the author be dead) of those naturally dependent upon, or properly expectant of the author's bounty.

Cross-appellee contends that neither under common law nor under American statutes, either state or federal, do the words "child" or "children" mean only legitimate child or children in so far as the statutes of the United

States relating to copyrights are concerned; that the limitations at common law with respect to the words "child" or "children" apply only to the cases of inheritance and succession, neither of which is involved herein; further, that the aforementioned statutes of the State of California, wherein said decedent resided for many years prior to and at the time of his death, have mitigated the rigors of the common law with respect to the words "child" and "children" and conferred rights on them which the ancient common law denied; and further, that Section 24, Title 17, U. S. C., does not require the restriction of the words "child" or "children" to mean only legitimate child or children, and that the aforementioned acknowledgment of Stephen William Ballentine by George G. DeSylva as a son, clearly makes cross-appellee a child of said deceased within the meaning of the statutes of the United States related to copyrights.

The Trial Court, in its Memorandum re Motions for Summary Judgment (Appx., *infra*), stated that it has been the Court's intention to find the child Stephen William Ballentine to be a child of the decedent within the meaning of the Copyright Statutes. It clearly appears therefrom that there was no doubt in the Trial Court's mind that the undisputed facts were sufficient upon which to predicate its judgment to the effect that cross-appellee is a child of the deceased, within the meaning of the statutes of the United States relating to copyrights.

ARGUMENT.

I.

Cross-appellee Is a “Child” of the Original Copyright Holder Within the Meaning of the Copyright Laws Pertaining to the Renewal of Copyrights.

A. The Harsh Early Common Law Rule Contended for by the Cross-appellant as to the Meaning of “Child” or “Children,” Does Not Apply to the Statutes of the United States Relating to Copyright.

The cross-appellant has taken the narrow and arbitrary position that no one except a child born of a lawful marriage could be considered a child within the meaning of the statutes of the United States relating to copyright. Under cross-appellant’s aforesaid contention, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, regardless of any close relationship existing between said father and children and the love and affection shown for one to the other, would still not be considered a child of said father for any purpose or purposes whatsoever.

Furthermore, cross-appellant would give an *unchangeable meaning* to the words “child” or “children” regardless of the passage of time or any change in circumstances. A word may vary greatly according to the circumstances and the time in which it is used,¹ and the same phrase

¹Mr. Justice Holmes in *Towne v. Eisner* said:

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” (*Towne v. Eisner*, 245 U. S. 418, 33 S. Ct. 158, 159, 62 L. Ed. 372.)

may have different meanings in different connections,² and the same words may have different meanings in different parts of the same act,³ and words of a statute to which meaning is to be given are not phrases of an Act with a changeless connotation,⁴ and the meaning of words are continually shifting with the times.⁵

Cross-appellee respectfully contends that as heretofore set forth, *the within action does not involve a statute of inheritance*. Here, we are dealing with a new right granted directly to the persons enumerated. Hence, the common law limitation with regard to the meaning of the words "child" or "children" claimed by the cross-appellant, is in no way involved in the within action.

²"But it needs no authority to show that the same phrase may have different meanings in different connections." (*American Security & Trust Co. v. Comrs. of The D. of C.*, 224 U. S. 491, 32 S. Ct. 553, 554, 56 L. Ed. 856.)

³"The same words may have different meanings in different parts of the same act, and of course words may be used in a statute in a different sense from that in which they are used in the Constitution." (*Lamar v. United States*, 240 U. S. 60, 36 S. Ct. 255, 257, 60 L. Ed. 526.)

⁴And Mr. Justice Cardozo in *First Nat. Bank & Trust Co. v. Beach* said:

"We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting." (*First Nat. Bank & Trust Co. v. Beach*, 301 U. S. 435, 57 S. Ct. 801, 804, 81 L. Ed. 1206.)

⁵And in *Massachusetts Protective Ass'n, Inc. v. Bayersdorfer*, it was held that:

"Words, after all, are but labels, whose content and meaning are continually shifting with the times." (*Massachusetts Protective Ass'n, Inc. v. Bayersdorfer*, 105 F. 2d 595, 597.)

B. The Harsh Early Common Law Rule With Regard to the Meaning of "Child" or "Children" Has Been Considerably Relaxed and Under the Present Concept Includes Children Born Outside of a Lawful Marriage.

The cross-appellant, on page 8 of her Opening Brief, quotes from 7 Am. Jur. 627 with regard to the meaning of an illegitimate child at common law. Immediately following said reference, we find the following:

"Most, if not all, of the States have enacted statutes mitigating more or less the rigors of the Common Law and conferring rights which that law denied, and the general tendency seems to be one of increasing liberality. 7 Am. Jur. 628." (Emphasis ours.)

California is amongst said states, as evidenced by Section 255 of the Probate Code of the State of California and Section 230 of the Civil Code of the State of California.

On page 721 of 7 Am. Jur., it is stated that:

"The severity of the Common-Law rule regarding the right of illegitimates to *inherit* has led to the passage of statutes in many jurisdictions modifying it, or abrogating it completely. These statutes rest upon the principles that the relationship of parent and child ought to produce the ordinary consequence of consanguinity and that it is unjust to punish the offspring for the offense of the parents. Since they are remedial, they are as a rule liberally construed, although there is some authority favoring a strict construction." (Emphasis ours.)

And at page 722 of 7 Am. Jur., we find the following:

"* * * At the same time it is generally recognized that the words 'children' and 'issue,' as used

in the statute of descent, are not necessarily confined to children and issue born in lawful wedlock, *but include also such children and issue as are by law capable of inheriting.*" (Emphasis ours.)

In the case of *Green, et al. v. Burch, et al.*, 164 Kans. 348, 189 P. 2d 892, it was held that illegitimate children being considered in the same category as legitimate children under the state's general public policy, the use of the term "children" alone in statute does not necessarily imply that illegitimate children cannot be considered in the same classification.

The Court, in said case, stated at page 895:

"The appellee places particular reliance upon the construction which was given by this court to the so-called 'soldiers' compensation act' in the case of *Miller v. Miller*, 116 Kan. 726, 229 P. 361, 362, 35 A. L. R. 787. In the last-cited case it was held that a son, who was the child of a bigamous marriage and therefore illegitimate, was within the statutory provisions granting soldiers' compensation benefits to minor children of veterans. In such case it was urged that in the absence of a specific provision to the effect that illegitimate children should share in the bounty of the state, the legislature necessarily intended that only children born in lawful wedlock should receive the compensation earned by the service of the veteran. In the *Miller* case, *supra*, this court clearly was passing upon the meaning which should be given to the term 'children' in Kansas. The involved statute provided that compensation should be paid for the use and benefit of the widow and minor 'children,' if any, and did not define the term 'children.' The opinion in the *Miller* case, *supra*, written by Mr. Chief Justice Johnston, reads:

“* * * Who are the minor children to whom reference is made? Manifestly, they are those for whose life the veteran is responsible and to whom he owes the obligation of maintenance. The statute makes no discrimination between legitimate and illegitimate minor children. It is an independent provision creating a new obligation of the veteran, recognizing his responsibility to support his minor children and applying the compensation awarded to that purpose. The theory on which compensation is payable to wife or minor children is his obligation and duty to support them. However, if there had been no statute creating a specific obligation, the father would still be liable for the maintenance of his illegitimate child as well as one born in lawful wedlock. In *Doughty v. Engler*, 112 Kan. 583, 211 P. 619, 30 A. L. R. 1065, the court, after discussing the early common-law rule that parents were under no obligation to support illegitimate children, determined that this rule was repugnant to present day conceptions of social obligations, and so unadapted to our conditions, and so unsuitable to the needs of the people, that it cannot be regarded as a part of the law of this state. * * *

And said Court further stated, at page 896:

“Unquestionably, the case of *Miller v. Miller*, *supra*, and the cases therein cited, are strong authority to the effect that under the general public policy of this state, illegitimate children should be considered in the same category as legitimate children. As a consequence, it cannot be correctly urged in Kansas that the use of the term ‘children’ alone necessarily implies that illegitimate children cannot be considered in the same classification. And it should be borne in mind that the case of *Miller v. Miller*, *supra*, was decided by this court in October, 1924. * * *

It was held in *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179, that the term "child" in a statute authorizing a suit for wrongful death by its parent cannot be limited to mean legitimate child only. Here a recovery was allowed to a mother suing for the wrongful death of her illegitimate child. The court based its opinion upon the law of the State of Missouri which enables an illegitimate child to inherit from its mother in contravention to the harsh old common law rule that an illegitimate child has no inheritable blood.

In *Galveston H. & S. A. Ry. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705, an illegitimate child, suing through his next friend for the wrongful death of his mother, was allowed a recovery under the Texas wrongful-death statute, and this case again based its reasoning on Texas' modification of the old common law rule that an illegitimate child has no inheritable blood.

The old common-law policy with respect to the incapacity of illegitimates was confined principally to the right to become an heir and to hold church office, and in all other respects there was no distinction between an illegitimate child and another man.⁶ This common-law policy was founded on the necessity * * * "that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied on as determining the heir."⁷

According to the aforesaid outstanding authorities as to what the common-law embodied, the lack of any right

⁶See *Blackstone* (1 Bl. Comm. New Ed., 1825), 492; please see also *Kent, Commentaries on American Law* (11 Ed., 1867), Vol. 2, p. 230.

⁷*Ayer, Legitimacy and Marriage* (1902); 16 *Harv. L. Rev.* 22, 23.

of inheritance was apparently the fundamental and original disability inflicted upon the illegitimate child. It is respectfully urged that when the right of inheritance was bestowed upon a child by statute, such as the aforementioned Section 255 of the Probate Code of the State of California, the basic disability is removed, and that it should logically be reasoned that the incidental disabilities must fall of their own weight.

C. Under the Laws of the State of California, the Word "Child" or "Children" Includes All Children, Legitimate or Illegitimate, Upon Whom Has Been Conferred by Law the Capacity of Inheritance.

In *Wolfe v. Gall*, 32 Cal. App. 286, 163 Pac. 346, 350, the Court stated as follows:

"That the words 'children' and 'lawful issue' when found in statutes of succession are not to be confined to their strict common-law signification was decided by our Supreme Court in the Estate of Wardell, 57 Cal. 484, 491, where it is said:

"'If courts were now to restrict the word to its common-law meaning, all children born of an unlawful marriage, *all children by adoption or acknowledgment of their father*, and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute, the offspring of marriages null in law (section 84, Civ. Code), children born out of wedlock whose parents subsequently intermarried (section 215, *Id.*), and children by acknowledgment or adoption of their father (sections 224, 227, 228, and 230, *Id.*), *are all legitimate. These, although incapacitated at common law from succeeding to any rights of their father, are regarded for all purposes*

*as legitimate from the time of their birth. * * **
Hence the term 'children,' as used in section 1307 of the law of succession, must relate to *status*, not to origin—to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they may have been begotten. *The word has, therefore, a statutory and not a common law meaning; and its meaning includes all children upon whom has been conferred by law the capacity of inheritance.'*" (Emphasis ours.)

Section 255 of the Probate Code of the State of California, provides in part as follows:

"Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock * * *."

In the Statement of Undisputed Facts accompanying plaintiff's Motion for Summary Judgment [Tr. pp. 21-24], it is clearly demonstrated that the decedent, George G. DeSylva, many times acknowledged in writing before witnesses that plaintiff was his son. It is thus clear that the plaintiff would have inherited from his father if his father had died intestate.

Looking further to the authorities in California, we find set forth in the *Estate of Lund*, 26 Cal. 2d 472, 159 P. 2d 643, a statement of policy in connection with illegitimate children which is applicable to the instant case. In that case, after first noting the early common law antagonism to both adoptions and legitimation of children

and then tracing the development of the attitude of the law toward illegitimates, the Court went on to state, at 26 Cal. 2d 480:

“* * * The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be visited justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him, will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice * * * *It cannot be seriously disputed that the public policy of California disavows the common-law tenets and favors legitimation * * **” (Emphasis ours.)

See also *Turner v. Metropolitan Life Insurance Co.*, 56 Cal. App. 2d 862, 133 P. 2d 859, involving the question of whether an illegitimate child took as a beneficiary under an insurance contract *payable to the children of the insured*. The Court there pointed out that the ordinary and popular sense in which the word “child” is understood, is as defined in the dictionaries, to wit, a son or daughter; a male or female in the first degree; the immediate progeny of human parents. The Court went on to state that by statutory enactments in this state, illegitimate children have been placed on a full parity as legitimate insofar as support and maintenance are concerned. The Court said at page 861 of 133 P. 2d:

“* * * It is a matter of common knowledge that in most cases the real purpose of life insurance is to provide for the maintenance of the insured’s

dependents; and as will be seen, if the insured father herein had lived he would have been legally bound by civil and criminal laws to maintain his child, notwithstanding it was his illegitimate child. It would seem, therefore, that in the absence of any restrictive language to the contrary in the policy herein *it was not unreasonable for the trial court to construe the word 'children' as used in the policy as meaning all children* of the insured that he was legally bound to maintain * * *.” (Emphasis ours.)

And again at page 862:

“Even at common law it was held in some instances that the maxim that an illegitimate is *nullius filius* applied only in cases of inheritance (7 Cor. Jur., p. 958, note 42a; Garland v. Harrison, 8 Leigh, Va., 368; Hains v. Jeffell, 1 Ld. Raym. 68, 91 Eng. Reprint 942; Rex v. Hodnett, 1 T. R. 96, 99 Eng. Reprint 993); * * *.”

The following excerpts from the Memorandum Opinion by that learned probate jurist, Judge Newcomb Condee, in *Estate of Sweed*, No. 305109, Los Angeles County Superior Court (Memorandum Opinion published in Los Angeles Daily Journal Reports, Vol. 3—No. 10—Oct. 1952), are pertinent to the question involved in this cross-appeal. In said action the Court, after quoting from Section 255 of the Probate Code, for the purpose of determining the meaning of the words “lineal issue” in connection with certain claimed inheritance tax exemption, stated:

“It is the contention of the controller that the term, ‘lineal issue’ does not extend to illegitimates

legitimized by their father, as it probably does not include adopted children.

* * * * *

“Webster’s Dictionary defines ‘issue’ as ‘progeny, offspring;’ it defines ‘descendant’ as ‘one who descends, as offspring.’ As to the definition of the words ‘child’ and ‘children’ the following observations from *Turner v. Metropolitan Life Insurance Co.*, 56 Cal. App. 2d 862, at page 865, seem to be controlling in the instant situation:

“and clearly the ordinary and popular sense in which the word child (the singular of children) is understood is as defined in the dictionaries, to wit: a son or daughter; a male or female in the first degree; the immediate progeny of human parents (Webster’s Dictionary): the offspring, male or female of human parents (Standard and Oxford Dictionaries). *No distinction is drawn between legitimate and illegitimate offspring.* It is quite true that in the *law* dictionaries the technical legal definition of “child” is restricted to conform to the common law definition, that is to legitimate children.’

“The case then went on to hold that technical definitions in the *law* dictionaries did not control insurance contracts. *It should not be presumed that our legislature meant to use the technical sense of the term based purely on the common law status of illegitimates as nullius fillius, when it employed the synonymous term ‘lineal issue’ in subdivision (a) of Section 13307, Revenue and Taxation Code, rather than the common meaning.* Especially is this so in view of the fact that *this same legislature has broken away from the common law concepts of bastardy and given illegitimates a new and different status, thereby eliminating any reasonable basis for adhering to the common law definition.*

“The word ‘children’ was also defined and construed in Estate of Wardell, 57 Cal. 484. In considering the use of the term in former Section 1307 of the Civil Code (the predecessor of our present Section 90 of the Probate Code), the court expressly repudiated the contention raised that the word included only legitimate children. It held the term must relate to *status*, not to origin and that *it has a statutory and not a common law meaning, including all children, legitimate or illegitimate, upon whom has been conferred by law the right of inheritance*. See also Wolf v. Gall, 32 Cal. App. 286, at page 295, quoting from the Wardell case and observing that the words ‘children’ and ‘lawful issue’ when found in statutes of succession are not to be confined to their strict common law signification.

“The policy of the California law is clearly set forth in Estate of Lund, *supra*, at page 480. At page 479, it is noted that the common law was antagonistic to both adoptions and legitimation of children. The attitude of the law toward illegitimates was then traced from the earliest times to the present, both as developed by the common law and the civil law. It is then stated at page 480, ‘The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be vested justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice . . . *It cannot be seriously disputed that the public*

policy of California disavows the common-law tenets and favors legitimation.' And again, at page 485, the court states: 'We deem it uncontestable that each state may formulate its own public policy in respect to legitimation and can enact laws to carry out its policy.' While speaking of full legitimation in this case, the liberal policy enunciated bears with equal effect upon the *partial legitimation* afforded by Section 255, Probate Code, which gives the illegitimate the right to inherit under such circumstances as are present in the instant case, as if he had been born in lawful wedlock." (Emphasis ours.)

As pointed out by Judge Condee in said Opinion, although the *Lund* case speaks of full legitimation, the liberal policy enunciated bears with equal effect upon the partial legitimation afforded by Section 255 of the Probate Code of the State of California.

The cases cited by Judge Condee in his aforesaid opinion clearly indicate the public policy of California to disavow the common-law tenets and to favor legitimation, and that the California legislature has broken away from the common-law concepts and given illegitimates a new and different *status*, such as the legitimation afforded by Section 255 of the Probate Code, thereby eliminating any reasonable basis for adhering to the common-law definition. The aforesaid quoted portions, in speaking of the word "children," indicate that the said term must relate to *status*, not to origin, and that today the term "child" includes all children, legitimate or illegitimate, upon whom has been conferred by law the right of inheritance.

D. The Purposes and Intent of the Copyright Law Requires the Inclusion of the Cross-appellee Within the Purview of the Phrase "Children of the Author" Used Therein, and the Cross-appellee Is a Child of George G. DeSylva, Deceased, Within the Meaning of the Statutes of the United States Relating to Copyrights.

It is respectfully urged to the Court that Title 17, U. S. C., Section 24, merely uses the words "children of the author" without defining the word "children." By the same token, said section makes no discrimination between legitimate or illegitimate children. It was stipulated between the parties that Stephen William Balentine is the son of George DeSylva, deceased [Tr. p. 20]. *The foregoing alone should suffice to constitute the aforesaid minor a child* within the meaning of the statutes of the United States relating to copyrights, as concluded by the District Court. Here, however, we have the additional facts and finding that said minor was acknowledged in writing and before witnesses to be the child of George G. DeSylva within the meaning of Section 255 of the Probate Code of the State of California.

Section 24 of Title 17, U. S. Code is not a statute of inheritance but creates a new right. The right to the renewal does not grow legally out of the original copyright but is a "new creation for the benefit (if the author be dead) of those naturally dependent upon, or properly expectant of, the author's bounty."

Silverman v. Sunrise Pictures Corp. (2d Cir., 1921), 273 Fed. 909, 911.

See also *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697, 700.

The purpose of the aforesaid section is to provide as a matter of public policy that the right of renewal should be personal and that the author, or those named as the persons in whom he is most concerned, should not in any way be cut off from the benefit of the new monopoly.

White-Smith Pub. Co. v. Goff (1st Cir., 1911),
187 Fed. 247, 253.

Exhaustive research has indicated that there is no case defining the word "children" as used in Section 24 of the Copyright Act. Perhaps the closest case in point is the leading case of *Middleton v. Luckenbach S. S. Co.* (2d Cir., 1934), 70 F. 2d 326. That case involved the deaths of several persons on the high seas. Recovery was sought under the Federal Death Act, which provided for a suit to recover damages for the benefit of "decedent's wife, husband, parent, child or dependent relative * * *." The questions presented in that case were whether under such statute an illegitimate child could recover for the death of its mother and also whether the mother of such a child is entitled to recover damages for its death. *The Court answered both questions in the affirmative.* The opinion pointed out that in its ordinary meaning the word "child" would include an illegitimate child; that although under some constructions as found in *legal dictionaries* the word "child" means a legitimate child, such construction originated in the consideration of wills, deeds, and statutes of inheritance, which differ from the questions here under consideration. In language particularly appropriate to our case, the Court went on to state at pages 329 and 330 as follows:

"There is no right of inheritance involved here. It is a statute that confers recovery upon dependents,

not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. *Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view.* The purpose and object of the statute is to continue the support of dependents after a casualty. *To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act.* The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. *The rule that a bastard is nullius filius applies only in cases of inheritance.* Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood. 2 Kent's Commentaries (12th Ed.) 215." (Emphasis ours.)

It was held in *Compagnie Generale Transatlantique v. United States* (1948), 78 Fed. Supp. 797, that an acknowledged illegitimate child is a child within the statute bestowing citizenship upon a foreign-born child. The Court in said case pointed out that the purpose of the statute bestowing citizenship on a foreign-born child of an American citizen was to insure that the child had in it the blood of an American citizen and that that fact would be evident without the uncertainties of a contested trial of paternity. The statute therein involved speaks of "any child" whose father is a citizen of the United States. Said statute did not define the words "any child." The question there involved was whether said statute included an

acknowledged illegitimate child. The Court in answering said question in the affirmative stated:

“* * * An interpretation of the citizenship statute, then, to the effect that each of these children was the ‘child’ within the meaning of the statute, of an American citizen, in no way offends the mores of this Country, and we give the statute such an interpretation. It follows that the children were American citizens, * * *”

The aforesaid liberal construction of the meaning of the word “child” to include an acknowledged illegitimate child is indicative of the present trend to relax the harsh early common law rule and not punish the offspring for the offense of the parents. In said case an act of Congress gave certain rights of citizenship to “any child” whose father is a citizen of the United States. Such a right was of utmost importance to such child, and the Court’s construction of the statute to include said acknowledged illegitimate child as a child of his citizen father gave said child the rights to which he was legally and morally entitled. Here an act of Congress has given certain rights of renewal of copyrights to a “child” of an author. In the *Compagnie* case, as here, the act in question did not define the word “child.” There, as here, there was an acknowledgment of the child and no question of proof with respect thereto.

As previously maintained herein, one of the main purposes of Section 24 of the Copyright Act was to provide for the maintenance of the deceased author’s dependents. The Court in *Turner v. Metropolitan Life Insurance Co.*, *supra*, went on to state that cases construing statutes in which the term “child” had been defined would not be in point, since if there is a definition in the statute that defi-

nition would control. The Court in that case then concluded that

“there being no words of limitation or restriction used in the policy in connection with the word ‘children,’ it agreed with the conclusion reached by the Trial Court that said word should be taken in its ordinary and popular sense (Civ. Code 1644) *which means all children of the insured.*” (Emphasis ours.)

It is respectfully submitted that the foundation of the common law policy which was the question of difficulty of proof is eliminated in the case of an *acknowledged child* such as we have here. In so far as the purpose of Section 24 of the Copyright Act is concerned, an acknowledged illegitimate child should be equally entitled to the benefits as a legitimate child. Certainly, the father has no less a duty to such child than to a legitimate child and such a child should receive the same benefits and protection of the law as a legitimate child. *The modern law as distinguished from the old common law so provides.*

It is further respectfully submitted that the case of *Middleton v. Luckenbach S. S. Co., supra*, in its reasoning and language is directly applicable to the present case and was not based on any substantial differences in language in the Federal Death Act as compared with the Copyright Act. The Court, in that case, emphasized that the inclusion of an illegitimate child within the purview of “decedent’s wife, husband, parent, child or dependent relative” would carry out the purposes of the act, and to hold otherwise would defeat the purposes of the act. In words which are directly applicable to the instant case, the Court based its decision on the following:

“There is no right of inheritance involved here. It is a statute that confers recovery upon dependents,

not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support.”

By any present day standards the plaintiff, as the acknowledged and admitted child of Mr. DeSylva, was both legally and morally entitled to support to the same extent as though born in wedlock, and therefore, to carry out the purposes of the Copyright Act in question, *the common, ordinary and natural significance of the term “child”* should be taken, which would include plaintiff as a child of Mr. DeSylva within the meaning of said Copyright Act.

All rights sued for herein were specifically reserved in connection with and excepted from the compromise and settlement with the executors of the estate of George G. DeSylva, deceased, and the reference to the sum of \$99,000.00 in connection with the vast estate of the decedent, made on page 26 of the Transcript of Records is wholly immaterial to the issues herein involved and should be entirely disregarded.

The case of *Pfeifer v. Wright*, 41 F. 2d 464, cited by cross-appellant, has no pertinancy to the issues involved here. In that case the decedent died domiciled in Oklahoma and the question was whether the child in question would inherit with respect to Oklahoma property. The child was an illegitimate child and had been acknowledged in accordance with the law of Kansas. The Court held that the child was an heir with respect to property in Kansas but not with respect to property in Oklahoma.

Cross-appellant relies heavily upon the case of *Flood's Estate*, 217 Cal. 763, 21 P. 2d 579 (discussed on page 16 of Cross-appellant's Opening Brief), with respect to the

status of cross-appellee under the California law. Said case deals with legitimation under Section 230 of the Civil Code (a matter not determined here). The Supreme Court of California specifically stated in its opinion in said case that Probate Code Section 255 is not involved in said proceeding and that petitioner's claim therein was based upon legitimation under Section 230 of the Civil Code. In this cross-appeal, as previously set forth, the Trial Court did not base its judgment upon the disputed facts pertaining to legitimation under Section 230 of the Civil Code of the State of California; and in effect held that the undisputed facts, which included an acknowledgment within the meaning of Section 255 of the Probate Code of the State of California, were sufficient upon which to predicate its judgment to the effect that cross-appellee is a child of the deceased within the meaning of the statutes of the United States relating to copyrights.

In *In re Wehr's Estate*, 96 Mont. 245, 29 P. 2d 836, decided by the Supreme Court of Montana, it was held that,

“Under statute, an *illegitimate child acknowledged by the father* is placed on the same footing as a legitimate child so far as right of inheritance of father's estate is concerned.” (Emphasis ours.)

It is noteworthy that the statute there under consideration was very similar to Section 255 of the Probate Code of the State of California.

The reference by the cross-appellant to the case of *Wong v. Wong Hing Young*, 80 Cal. App. 2d 391, 181 P. 2d

741, has no apparent pertinency to this case. That case simply pointed out the distinction between an adoption as a legitimate child under Section 230 of the Civil Code of the State of California and the partial legitimation under Section 255 of the Probate Code.

E. The Law of the State of Residence of the Decedent, and Not the Common Law, Determines the Definition of "Children" in the Copyright Act, Which Does Not Contain a Definition of "Children."

The absence of a definition of "children" in the Copyright Act herein involved plainly indicates the purpose of Congress to leave the determination of that question to the state law, which in this case is the law of the State of California, the state of residence of the decedent at all times herein involved, and *not to the common law*.

The case of *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 492, involved the construction of the words "next of kin" as used in a Federal Employers Liability Act. Said act contained no definition of who are to constitute the next of kin to whom a right of recovery was granted. The Court in said case held that the "next of kin" for whose benefit an action under the Federal Employers Liability Act may be maintained, are those who are the next of kin *under the local law*.

The Supreme Court of the United States stated in said case, at pages 460 and 461 :

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But, as speaking generally un-

der our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. * * *

“* * * The controversy was whether the word ‘heirs’ under the statute should be taken in its common-law meaning, and therefore not to give a right to complete the entry to illegitimate children who had been recognized by their father, the preemptor, and who were his heirs under the ‘law of the state of Kansas, where the land was stipulated and where the deceased preemptor was domiciled. The court said: ‘We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words ‘heirs of the deceased preemptor’ as used in the section to persons who would be heirs at common law (children not born in lawful matrimony being, therefore, excluded), rather than those who might be such according to the *lex rei sitae*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word ‘heirs’ would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. * * * Undoubtedly the word ‘heirs’ was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was

thereby designed to be determined otherwise than by the law of the state which was both the situs of the land and the domicil of the owner,' pp. 68, 69. And there is no ground for taking this case out of the rule thus announced upon the theory that the controversy involved the title to real estate, contracts concerning which are governed by the law of the situs, since we are dealing here with the subject of next of kin, which, so far as legislative power is concerned, under our constitutional system of government, is inherently local and to be determined by the rules of the local law. * * * 'And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective states of the domicil of the original sufferers.'"

See also *Middleton v. Luckenbach S. S. Co.*, 70 F. 2d 326.

This Honorable Court in the case of *Weyerhaeuser Timber Co. v. Marshall* (C. C. A. 9, 1939), 102 F. 2d 78, had occasion to pass upon a situation involving an Act of Congress which lacked a definition of its terms and this Honorable Court stated in said case, at page 81:

"* * * The Act defines 'widow' as including only the 'decedent's wife.' Thus the conclusion as to whether a claimant is a 'widow' depends upon whether she previously was a 'wife'—a status left undefined by the Act, and thus under the doctrine of *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 492, 36 S. Ct. 458, 60 L. Ed. 762, to be solved by the application of state law. * * *

F. In the Event This Honorable Court Finds That a Determination of the Additional Facts Pertaining to the Question of Whether or Not Cross-appellee Was Legitimated Within the Meaning of Section 230 of the Civil Code of the State of California Was and Is Necessary to Establish That Cross-appellee Is a Child Within the Meaning of the Statutes of the United States Relating to Copyrights, Then the Cross-appellee Is Entitled to a Trial on Said Additional Facts and the Case Should Be Sent Back to the Trial Court for Said Purpose.

As previously indicated, each party made a motion in the Trial Court for summary judgment based only upon the undisputed facts and each contended that under the undisputed facts they were entitled to judgment as a matter of law. The Trial Court made findings of fact based upon the undisputed facts and rendered judgment. The Trial Court did not (and under the circumstances and law relating to summary judgment, could not) attempt to determine any disputed fact; and the Trial Court in effect held that the undisputed facts were sufficient upon which to predicate judgment, including its aforementioned conclusion of law that cross-appellee is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

The additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California (in addition to the acknowledgment under Section 255 of the Probate Code of the State of California which is not challenged herein) being in dispute, were not determined by the Trial Court, the said Court holding in effect that such determination was not necessary in view of the Court's decision that the undisputed facts were sufficient to establish that cross-appellee is a child within the

meaning of the statutes of the United States relating to copyrights.

It follows from the foregoing, therefore, that in the event this Honorable Court finds that a determination of the additional facts pertaining to the question of whether or not cross-appellee was legitimated within the meaning of Section 230 of the Civil Code of the State of California was and is necessary to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyrights, the cross-appellee is entitled to a trial on said additional facts and the case should be sent back to the Trial Court for said purpose. Cross-appellee, however, maintains that such determination was not necessary to establish that cross-appellee is a child within the meaning of the statutes of the United States relating to copyrights, and that the undisputed facts before the Trial Court were sufficient to establish the judgment to said effect.

Conclusion.

The word "children" taken in its normal and ordinary sense definitely includes the cross-appellee, who was the acknowledged child of decedent. While it may be argued that the old common law rule was that the word "child" meant legitimate child, such restricted definition was confined strictly to cases of inheritance and was founded upon the desire to eliminate uncertainty in the question of heirship. The statute here in question is not one of inheritance but creates a new right directly in the widow and children of a deceased author. There is no question of proof in the case of an acknowledged child and it is without question in the instant case that the cross-appellee was the child of decedent. The acknowledged illegitimate

child is just as dependent upon his father as a legitimate child and has just as much right to the benefits of a law created for the advantage of a deceased author's children. The beneficial purpose of Section 24 of the Copyright Act would be in part defeated by a construction that would define the word "children" to exclude an *acknowledged illegitimate child*.

For the reasons mentioned, it is respectfully submitted that cross-appellant's appeal is not well taken and should be held for naught and that this Honorable Court should affirm the District Court's conclusion of law incorporated in the judgment to the effect that cross-appellee, Stephen William Ballentine, is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

Respectfully submitted,

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Attorneys for Appellant and Cross-appellee.



APPENDIX.

In the United States District Court in and for the Southern District of California, Central Division.

Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Plaintiff, vs. Marie DeSylva, Defendant. No. 14,400-T.

MEMORANDUM RE MOTIONS FOR SUMMARY JUDGMENT.

The motion of plaintiff for a summary judgment is denied.

The motion of defendant for summary judgment is granted.

Some considerable issue has been presented concerning the right of Stephen William Ballentine, for whose benefit this action was prosecuted, to be treated as a child of decedent George G. DeSylva. If said child is not a child within the meaning of the copyright statute which the Court has been called upon to construe, there would be no need for the Court to construe the statute or to determine the respective rights of the widow and child.

The Court has determined that the child is a child within the meaning of the copyright statutes.

Because defendant's Findings of Fact did not make this clear but were rather drawn on the theory that the child was not a child within the meaning of that law, the Court has re-drafted the Findings of Fact and Conclusions of Law, and Judgment. In so doing it has been the Court's intention to hold for defendant on the question of statutory construction. It has been the Court's intention to find the child Stephen William Ballentine to be a

child of decedent within the meaning of the copyright statutes. Whereas the Findings of Fact, Conclusions of Law, and Summary Judgment have thus been re-drafted by the Court, copies thereof are herewith transmitted to counsel for such action, if any, as they may deem advisable.

It Is Ordered that said Findings of Fact, Conclusions of Law, and Judgment be entered this 29th day of April, 1953.

ERNEST A. TOLIN,
United States District Judge.